IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

MONDAY, THE 2ND JULY 2007 / 11TH ASHADHA 1929

SA.No. 182 of 1994()

AS.60/1990 of DISTRICT COURT, PATHANAMTHITTA
OS.155/1985 of MUNSIFF'S COURT, PATHANAMTHITTA
.....

APPELLANT: APPELLANT:PLAINTIFF:

KALLYANI AMMA BHARATHI AMMA,
KARATHAMPLACKAL MARUPPEL HOUSE,
KUMBAZHA, PATHANAMTHITTA.

BY ADV. SRI.K.K.GOPINATHAN NAIR
SRI.K.P.SATHEESAN
SRI.T.S.RAJASENAN

RESPONDENTS: RESPONDENTS-DEFENDANTS 1 TO 6:
---

1. **DAMODARAN, THUNDIYANIKUZHIYIL HOUSE, KUMBASHA, PATHANAMTHITTA.**

2. **GANGADHARAN, MANNIL HOUSE, MYLADUPARA, KUMBAZHA, PATHANAMTHITTA.**

3. **SOMAN, PEEDIKAYIL HOUSE, OF ....DO....**

4. **STATE OF KERALA, REPRESENTED BY DISTRICT COLLECTOR, PATHANAMTHITTA.**

5. **TAHSILDAR, PATHANAMTHITTA.**

6. **AYYAN GOPALAN, THUNDIYANIKUZHIYIL HOUSE, KUMBAZHA, PATHANAMTHITTA. (WRONGLY DESCRIBED IN A.S.JUDGMENT AS AYYAPPAN GOPALAN)**

BY ADV. SRI.N.SUKUMARAN)
SRI.S.SHYAM) for R1,R3 & R6
BY GOVERNMENT PLEADER for R4 & R5

THIS SECOND APPEAL HAVING BEEN FINALLY HEARD ON 02/07/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

ORDER ON C.M.P.NO.381/1994 IN S.A.NO.182/1994

DISMISSED

2/07/2007 **SD/-M.SASIDHARAN NAMBIAR, JUDGE**

/TRUE COPY/

Kss

M.SASIDHARAN NAMBIAR,J.

==========

S.A. NO. 182 OF 1994

==========

Dated this the 2nd day of July, 2007

JUDGMENT

Plaintiff in O.S.155/1985 on the file of Munsiff Court, Pathanamthitta is the appellant. Defendants are the respondents. Appellant instituted the suit seeking a decree for permanent prohibitory injunction restraining respondents 1 to 3 from blasting rocks contending that blasting of rocks would cause danger to the life of the members of the family of the appellant and to her residential building. It was contended that respondents are using explosives for blasting rocks and as a result, cracks have developed to the residential house and unless it is prevented by a decree for injunction, it would cause irreparable loss. Respondents 1 and 3 filed a joint written statement contending that appellant had earlier filed O.S.308/1984 which was dismissed and first respondent is a labourer engaged in

blasting rocks and third respondent is a lorry driver who was engaged for removing the rocks and they are not necessary parties and second respondent has a valid licence to use gun powder for blasting rocks and therefore appellant is not entitled to the decree sought for. Second respondent did not contest the suit. Sixth respondent got himself impleaded contending that the residential house of the appellant is 100 ft. away from item No.2 of the plaint schedule property and the blasting of rocks from the quarry will not cause any danger to the residential house of the appellant or danger to the life of members of the family of appellant. It was contended that no explosive substance is used for blasting rocks and even if rocks are blasted, it will not cause any harm and cracks developed in the floor of the house of the appellant only due to the old age of the house.

2. Learned Munsiff framed the necessary issues. On the evidence of Pws.1 to 4, Dws.1 to 3 and

Exts.A1 to A4 and Exts.B1 to B7 and C1 to C4, learned Munsiff found that evidence did not prove that blasting of rocks caused any danger to the life or damage to the property as alleged and therefore appellant is not entitled to the decree sought for. Appellant challenged the decree and judgment before District Court, Pathanamthitta in A.S.60/1990. Learned District Judge on reappreciation of evidence confirmed the findings of the learned Munsiff and dismissed the appeal. It is challenged in the Second Appeal.

3. Second Appeal was admitted formulating the following substantial questions of law.

1) Under the facts, circumstances and evidence in the case, is the court below justified in dismissing the suit when substantial danger to the property and house of the plaintiff and inmates of the house were prima facie substantiated by the plaintiff?

2) Is it legal and proper for the court below to assume that there is no possibility of danger

and nuisance to the plaintiff due to blasting of rocks, when there is evidence of actual danger and damage to the house?

4. Learned counsel appearing for appellant and respondents 1, 3 and 6th respondent were heard.

5. The argument of learned counsel appearing for appellant was that along with the appeal, appellant filed C.M.P.381/1994 an application seeking an order for injunction restraining respondents from blasting rocks and as per order dated 21.2.1994 an order of injunction was granted which was subsisting till this day and in such circumstance even if the decree is to be confirmed, appellant may be permitted to seek appropriate remedy, if blasting of rocks causes any danger or damage on a future date.

6. Learned counsel appearing for respondents argued that no substantial question of law is involved in the appeal and both the trial court and first appellate court found that blasting of rocks will not cause any danger to the appellant or her

family members or damage to the residential house and in such circumstance, there is no reason to interfere with the decree granted by the courts below.

7. On hearing learned counsel appearing for appellant and respondents and on going through the judgments of the courts below, I do not find any substantial question of law involved in the appeal. Eventhough, when the appeal was admitted substantial questions of law were formulated respondents are entitled to contend that on the facts and evidence, no such substantial question of law arises, in view of sub section (5) of Section 100 of Code of Civil Procedure. What was contended by appellant was that due to the blasting of rocks using high explosives, cracks developed on the floor of the residential house and the tiles were broken and it may lead danger to the life of the members of the family. The trial court and first appellate court on appreciating the evidence entered a factual finding that

residential house of the appellant is 100 ft. away from the place where rocks are being blasted and there is level of 150 ft. from the residential property of the appellant and the place from where the rock is blasted. Courts below also found that there is no evidence to prove highly explosive substances are used for blasting rocks. Courts below also entered a factual finding that evidence do not establish that blasting of rocks cause any damage to the residential house or danger to the inmates of the house. It is on that basis it was found that appellant is not entitled to the decree sought for. Those factual findings cannot be interfered in exercise of the powers of this court under section 100 of the Code of Civil Procedure by reappreciating the evidence. The appeal fails and is dimissed.

M.SASIDHARAN NAMBIAR
JUDGE

tpl/-

M.SASIDHARAN NAMBIAR, J.

S.A.182/94

JUDGMENT

2ND JULY,2007